

No. 05-181

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**In the Supreme Court of the United States**

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WILLIAM CONEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the court of appeals applied the correct standard of review and legal principles in holding that the government had provided a satisfactory explanation under 18 U.S.C. 2518(8)(a) for its delay in sealing wire-tap tapes.

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-7) is reported at 407 F.3d 871. The order of the district court denying petitioner's motion to suppress (Pet. App. 8-11) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on May 11, 2005. The petition for a writ of certiorari was filed on August 4, 2005. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois on one count of conspiracy to possess with

intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846, and three counts of unlawful use of a telephone while conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. 843(b). He was sentenced to 240 months of imprisonment, to be followed by a five-year term of supervised release. Gov't C.A. Br. 1-3. The court of appeals affirmed the conviction, but remanded for resentencing. Pet. App. 7.

1. In August 1996, Federal Bureau of Investigation (FBI) agents began investigating a drug organization in the Englewood area of Chicago, Illinois. The investigation focused on a drug dealer named Charles Jackson and his associates. An informant made eight controlled undercover purchases from Jackson. The purchases were documented by surveillance photos, and in some cases, videos. Gov't C.A. Br. 3-4.

As part of the investigation, then-Chief Judge Marvin E. Aspen of the United States District Court for the Northern District of Illinois authorized, pursuant to 18 U.S.C. 2518, the interception of wire communications to and from Jackson's cellular telephone and pager and communications to and from the phone of Robert Allen, one of Jackson's suppliers. Gov't C.A. Br. 4-5; Pet. App. 12-13. Chief Judge Aspen issued three separate surveillance orders. The first ran from August 8, 1997, through September 7, 1997. The tapes from this wiretap were immediately submitted to and sealed by the district court. The second order authorized an extension of the surveillance of the same cellular phone from September 10, 1997, through October 10, 1997. The government submitted the tapes from this wiretap to the chief judge for sealing on October 20, 1997. Gov't C.A. Br. 16-17.

The wiretap tapes included at least nine calls in which petitioner participated in conversations relating

to narcotics transactions with Jackson or Allen. Gov't C.A. Br. 3-5.

2. On January 26, 2000, a federal grand jury charged petitioner with one count of conspiring to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. 846, and three counts of unlawful use of a telephone in the commission of a conspiracy to possess and distribute mixtures containing cocaine in violation of 21 U.S.C. 843(b). On June 26, 2001, the grand jury returned a superseding indictment charging the same offenses. Gov't C.A. Br. 2-3.

On June 27, 2000, petitioner filed a motion to suppress the communications intercepted during the second wiretap. Petitioner argued that the tapes from the wiretap had not been sealed “[i]mmediately,” and the government had not provided a “satisfactory explanation” for the delay in submitting the tapes for sealing as required by 18 U.S.C. 2518(8)(a). In response to petitioner’s motion, the government submitted affidavits from the two prosecutors coordinating the investigation, Jacqueline Ross and Kaarina Salovaara. Pet. App. 12-16. Ross and Salovaara stated that the delay in sealing the tapes was the result of a miscommunication about the handling of responsibilities during Ross’s vacation and the date on which Ross was returning to the office. When Ross returned from vacation on Friday, October 17, 1997, she learned that the tapes had not yet been sealed, and she immediately prepared the necessary sealing application and order. She was unable, however, to file the papers until Monday, October 20, 1997, because of the unavailability of either Chief Judge Aspen or the FBI case agent. *Ibid.*

On November 17, 2000, the district court denied petitioner’s motion to suppress the communications. The

court found that the government's explanation for the delay was that there had been a mistake; that such a mistake can be "accepted as [a] satisfactory explanation[]"; that the explanation was an "honest one"; and that the delay was shorter than that excused by other courts. Pet. App. 8-11.

3. The court of appeals affirmed. Pet. App. 1-7. The court first held that the ten-day delay in submitting the tapes was too long for the sealing to be considered "immediate." *Id.* at 3. The question, then, was whether the government's explanation for the delay was satisfactory.

The court held that a district court's determination that an explanation in the particular context is "satisfactory" is closely tied to factual, not legal, determinations, and thus should receive deferential review. Pet. App. 3-4. Under such review, the court of appeals held that an explanation is satisfactory if, "in the circumstances, it dispels any reasonable suspicion of tampering." *Id.* at 6. Whether it does so depends on a number of factors, the court explained, including the plausibility of the explanation, the length of the delay, the nature of the crime and the notoriety of the defendant, and the importance of the tapes to the government's case. *Ibid.*

In this case, the court of appeals held that because the delay was relatively short, the prosecutors' explanations were plausible, the case was a routine drug prosecution of a defendant of no particular notoriety, the prosecutors had no special motive to tamper with the tapes or lie in their affidavits, and there was no suggestion of a pattern in the Office of the United States Attorney for the Northern District of Illinois, or the Justice Department generally, of failure to comply with the requirements of Section 2518(8)(a), the explanation was satisfactory. Pet. App. 6-7.

**ARGUMENT**

Petitioner contends (Pet. 5-7) that this Court should grant review because the court of appeals' decision conflicts with the rulings of four other courts of appeals and contravenes this Court's decision in *United States v. Ojeda Rios*, 495 U.S. 257 (1990). That claim lacks merit, and further review is not warranted.

1. Except under extraordinary circumstances, see 18 U.S.C. 2518(7), electronic surveillance may be conducted only pursuant to a court order. See also 18 U.S.C. 2518(1)-(6). Section 2518(8)(a) requires that “[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device” and that recording “shall be done in such a way as will protect the recording from editing or other alterations.” The section further provides that “[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.”

Section 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that “[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.” See *Ojeda Rios*, 495 U.S. at 259-260. Accordingly, unless wiretap tapes are sealed immediately or the government provides a satisfactory explanation for the delay in obtaining a seal, the tapes are inadmissible.

Petitioner asserts that there is a conflict among courts of appeals over the level of deference due a district court's determination that the government has proffered a "satisfactory explanation" for delay in sealing the tapes, within the meaning of 18 U.S.C. 2518(8)(a). Petitioner claims that the majority of circuits decide *de novo* whether the government's explanation is satisfactory, while only the Sixth and the Seventh Circuits view satisfactoriness as a factual determination to be reviewed for clear error. Pet. 5-6.

Although the Seventh Circuit perceived a conflict on this issue, see Pet. App. 3, any formal disagreement over the standard of review does not appear to have practical significance in either methodology or outcomes. Notwithstanding the statements by the Seventh and Sixth Circuits that satisfactoriness is a factual question, both circuits, in practice, have closely tracked the majority position, which is to defer to the evidentiary findings of the district court and then to arrive at an independent conclusion regarding whether the explanation was satisfactory within the meaning of Section 2518(8)(a).

The court of appeals in this case reasoned that, since "[t]he question what is a 'satisfactory explanation' is fact-specific \* \* \* rather than being governable by a rule that an appellate court might lay down," deference should be given to the district court's ultimate determination. Pet. App. 3. But before according such deference, the court engaged in a detailed analysis of the term "satisfactory" under Section 2518(8)(a), holding that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering." *Id.* at 6. The court went on to specify particular factors that might aid in making this determination, such as the believability of the explanation (which it

deemed “critical”), the plausibility of the explanation, the length of delay, the nature of the crime (including its notoriety or the notoriety of the defendant), the pressure on the government to obtain a conviction, and the importance of the tapes to the government’s case. *Ibid.* The court then applied this detailed legal standard to the uncontested facts of the delay in this case, and agreed with the district court that the government’s explanation was satisfactory.

This approach is not meaningfully different from that taken by the courts of appeals for the Second, Eighth, Ninth, and Tenth Circuits or, for that matter, the Sixth Circuit, where the courts have deferred to the factual findings of the district court but conducted their own examination whether, in light of those facts, the government’s explanation was satisfactory, taking into consideration such factors as the length of the delay, the credibility of the government’s reasons, and the likelihood of gamesmanship. See, e.g., *United States v. Cline*, 349 F.3d 1276, 1284-1285 (10th Cir. 2003); *United States v. Wilkinson*, 53 F.3d 757, 760 (6th Cir. 1995); *United States v. Pedroni*, 958 F.2d 262, 265-266 (9th Cir. 1992); *United States v. Sawyers*, 963 F.2d 157, 159-161 (8th Cir.), cert. denied, 506 U.S. 1006 (1992); *United States v. Maldonado-Rivera*, 922 F.2d 934, 951 (2d Cir. 1990), cert. denied, 501 U.S. 1211 (1991).

In any event, even assuming that the courts of appeals apply varying standards of review, this case does not present an appropriate vehicle for addressing the issue. Under any standard of review, the delay here was excusable. See *Ojeda Rios*, 495 U.S. at 265 (holding that the satisfactory explanation standard requires the government to explain why delay was excusable). The delay was short, there was no reason to believe it was tactical,

and there was no suggestion of tampering. See *Cline*, 349 F.3d at 1284 (“there [was] no evidence of bad faith and no indication that the recordings were tampered with or that there was any tactical advantage gained by” a one-week delay); *Wilkinson*, 53 F.3d at 760 (where there was no basis for inferring any prejudice to defendant, no evidence of tampering, and no indication that 15-day delay in sealing tape was either a deliberate flouting of the statutory requirement or an effort to gain tactical advantage, explanation was satisfactory); *Maldonado-Rivera*, 922 F.2d at 950 (“In general, explanations have been ruled satisfactory where the government advanced a bona fide reason, there was no reason to believe there was any deliberate flouting of the Title III requirements, no reason to doubt the tapes’ integrity, and no basis for inferring any other prejudice to the defendants.”).

There is also no indication that the standard of review has any significant bearing on the outcome of the decided cases. See *Pedroni*, 958 F.2d at 265 (explanation was satisfactory where “(1) integrity of the tapes maintained through special procedures; (2) total delay of only fourteen days; (3) tapes were ready for sealing in six days (and in three non-holiday work days); (4) delay due to heavy work load of responsible FBI agent; (5) part of delay due to judge’s unavailability and decision when to schedule hearing”); *United States v. Maxwell*, 25 F.3d 1389, 1394 (8th Cir.) (“Intervening weekends, holidays, and the unavailability of the issuing judge are satisfactory explanations for slight delays in presenting wiretap recordings for sealing.”), cert. denied, 513 U.S. 1031 (1994); *United States v. Ardito*, 782 F.2d 358, 362-363 (2d Cir.) (two-day intervening holiday, unavailability of issuing judge, and need to prepare paperwork provided

adequate explanation for five-day delay), cert. denied, 476 U.S. 1160 (1986). In the absence of indications that the different articulations of the standard of review are producing different results, this Court's review is not warranted.

2. Petitioner also argues (Pet. 7) that the court of appeals' decision conflicts with this Court's ruling in *Ojeda Rios* by permitting proof that tampering has not occurred to substitute for a satisfactory explanation for a delay in sealing. This argument, too, lacks merit.

This Court, in *Ojeda Rios*, held that the "'satisfactory explanation' language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable." 495 U.S. at 265. The court of appeals here applied that standard, considering carefully the government's explanation before excusing the delay. Pet. App. 7.

The court of appeals' analysis does not conflict with this Court's statement in *Ojeda Rios* that "proof of nontampering" is not a "substitute for a satisfactory explanation." 495 U.S. at 264-265. *Ojeda Rios* did not suggest that nontampering is irrelevant to the analysis. Indeed, this Court was clear that the central function of the sealing requirement is to guard against tampering, stating:

The primary thrust of § 2518(8)(a) and a congressional purpose embodied in Title III in general, is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations

that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.

*Id.* at 263 (citations omitted) (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968)). Nevertheless, *Ojeda Rios* made clear that non-tampering is not sufficient to satisfy Section 2518(8)(a)'s "satisfactory explanation" requirement, and that the government must also establish "good cause for the sealing delays." *Id.* at 265-266.

The court of appeals did not equate proof that tampering did not occur with proof of a satisfactory explanation. In observing that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering," Pet. App. 6, the court of appeals was explaining why it had rejected petitioner's argument that an explanation that "reveals that the delay was the result of carelessness" is per se inadequate. *Id.* at 5. The court found such a "strict" rule to be excessive in light of the purpose of the statute, which is to minimize the risk of tampering. *Id.* at 5-6.

But the court went on to make clear that the government's overall conduct had to be evaluated in order to determine whether its explanation was satisfactory, and nowhere suggested that proof of nontampering alone would satisfy the government's burden or substitute for a satisfactory explanation. Thus, the court held that whether an explanation is satisfactory depends on several factors, including the plausibility of the explanation, the length of the delay, the nature of the crime and the notoriety of the defendant, and the importance of the tapes to the government's case. Pet. App. 6. The court of appeals' approach, therefore, does not conflict with *Ojeda Rios*, in which this Court examined whether the

delays at issue “were the result of a good-faith, objectively reasonable misunderstanding.” 495 U.S. at 265.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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